BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BOBBI WILKERSON	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,028,003
STATE OF KANSAS	)	
Respondent	)	
AND	)	
	)	
STATE SELF INSURANCE FUND	)	
Insurance Carrier	)	

ORDER

Respondent appeals the September 17, 2008, preliminary hearing Order of Administrative Law Judge Brad E. Avery (ALJ). Claimant was found to have suffered an accidental injury which arose out of and in the course of her employment with respondent.

Claimant appeared by her attorney, George H. Pearson of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, Bryce D. Benedict of Topeka, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the evidentiary deposition of Bobbi Wilkerson taken September 2, 2008, with attachments; the evidentiary deposition of Marjorie Wolf taken September 10, 2008; the evidentiary deposition of Diane Waggoner taken September 10, 2008, with attachment; the transcript of Preliminary Hearing held September 12, 2008, with attachments; and the documents filed of record in this matter.

ISSUES

Did claimant suffer an accidental injury on February 25, 2006, which arose out of and in the course of her employment with respondent? Claimant alleges she suffered an injury to her right upper extremity and right lower extremity as she was assisting a Kansas Neurological Institute (KNI) resident get dressed. Claimant experienced an immediate pain in her neck, right arm and down the length of her body, including her right knee.

Respondent argues that the history of injury provided by claimant to the various health care providers and to respondent's representatives is contradictory on many levels and undermines the credibility of claimant and her alleged injuries.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant worked for respondent as a developmental disability technician (DDT), having started with respondent in June 2002. Claimant alleges that on February 25, 2006, while assisting a patient dress, she suffered a sudden onset of pain in her right shoulder, her right side and her right knee. Claimant's husband, Robert Wilkerson, testified that claimant came home after her 6:00 a.m. to 2:30 p.m. shift in tears, complaining of pain in her right shoulder and right leg. Claimant went to the emergency room at Stormont-Vail Healthcare, arriving at 1526 (3:26 p.m.). Claimant complained of pain and bruising to her right lower extremity, but denied any injury. On February 28, 2006, claimant was examined by George W. Wright, M.D., of the Cotton-O'Neil Clinic. Claimant was unable to provide Dr. Wright with a description of an injury, only stating that she reported to the emergency room and that she had left work to go there. Respondent argues these medical reports contradict claimant's allegations of an injury. However, sandwiched in between these incidents is a report to Marjorie Wolf, respondent's client training supervisor, on February 27, 2006, indicating that she had been advised by parties unknown that claimant had suffered a work-related accident on February 25, 2006. Claimant's injuries involved her right shoulder and right leg and the accident had occurred over the weekend.

Respondent attacks the testimony of claimant's husband, who testified that he was watching a football game on television when claimant came home on February 25, 2006. Respondent attached a copy of a television broadcast guide from the Topeka Capital-Journal for the date of February 25, 2006, alleging no football game was being broadcast at that time. Even if this Board Member was to accept this unsupported piece of evidence, there is no indication in this record as to which television provider claimant and her husband use. Certain services, including direct TV and satellite dish services, provide nearly 200 channels for viewing. The exhibit provided by respondent contains only 63 channels. There is no evidence of what games may have been available on other unlisted channels.

The confrontational nature of this litigation is made evident in the deposition of Diane Waggoner, respondent's LPN in personnel health. Claimant came to Ms. Waggoner on March 1, 2006, and reported the accident. An Employee Report Of Accident was

prepared by both claimant and Ms. Waggoner. When asked what claimant told her, Ms. Waggoner testified as follows:

> She filled out this paper, and in talking to her she states that she had seen her doctor for both her right shoulder and right knee late last year, which would be 2005. States she decided that since the problems came back they were probably work-related. States the swelling and bruising on her right leg concerned her so she called the ER and was told it was possibly a blood clot. She also went to her doctor and he said that he thought it was a Baker cyst that ruptured and leaked that caused the bruising. I referred to [*sic*] her to St. Francis at that point.[1]

The report contained three questions asking "What were you doing when the accident happened? How did the accident happen? Describe your injury."

In response, claimant wrote:

> While dressing him I felt a pull or cramp into my (R) shoulder and (R) leg and then seemed okay later that my (R) leg was swollen and a black bruise was on my calf and (R) shoulder stiff and very sore went to Stormont-Vail hospital and on Monday called my doctor and was seen on Tue.[2]

These are two very different perspectives from the same conversation about the same incident. That there would be disagreement in this instance about what injury claimant may have experienced and what was said by whom to whom is not a surprise.

For preliminary hearing purposes, this Board Member finds that claimant has proven that she suffered an accidental injury which arose out of and in the course of her employment with respondent.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[3]

---

[1] Waggoner Depo. at 7-8.

[2] Waggoner Depo., Ex. 1.

[3] K.S.A. 2005 Supp. 44-501 and K.S.A. 2005 Supp. 44-508(g).

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[4]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[5]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[6]

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.[7]

It is claimant's burden to prove an accident which arose out of and in the course of her employment with respondent. While it is a close question in this instance, this Board Member finds that claimant has satisfied that burden for preliminary hearing purposes. The medical records verify that claimant has had problems in both her right shoulder and right knee well before this incident on February 25, 2006, but in Kansas workers compensation, all that is required is that a preexisting condition be aggravated or accelerated. Here, claimant has proven an aggravation of her right shoulder and right knee stemming from the incident on February 25, 2006.

---

[4] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[5] K.S.A. 2005 Supp. 44-501(a).

[6] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[7] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[8] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has satisfied her burden of proving that she suffered an accidental injury on February 25, 2006, which arose out of and in the course of her employment with respondent.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Brad E. Avery dated September 17, 2008, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of January, 2009.

HONORABLE GARY M. KORTE

c: George H. Pearson, Attorney for Claimant
Bryce D. Benedict, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge

[8] K.S.A. 44-534a.